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Cross-Border Patent Infringement Litigation within the European Union

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Propositions

regarding the doctoral thesis

“Cross-Border Patent Infringement Litigation within the European Union”

by Michael Christian Alexander Kant

1. The principle of territoriality which *inter alia* applies to patents is a principle of substantive law, and as such has no relevance for international jurisdiction in cross-border patent infringement disputes.
2. The jurisprudence of the ECJ in *Shevill* cannot be transferred *in toto* to the constellation of cross-border patent infringement disputes, which however does not preclude the transferability to such disputes, of certain considerations made by the ECJ in this decision with regard to the territorial scope of authority to decide of the courts at the place of the event giving rise to the damage and at the place where the damage occurred or may occur.
3. As to the possibility of an extraterritorial place of the event giving rise to the damage at the place of manufacture with regard to a European patent, a differentiation between product patents and process patents seems, in principle, reasonable and justified.
4. Only the place where the patent has been infringed (“*Ort der Rechtsgutverletzung*”) is to be considered the place where the damage occurred or may occur according to Article 7(2) of the Brussels Ibis Regulation.
5. Article 24(4) of the Brussels Ibis Regulation has no reflexive effect in case of patents granted in, respectively for, third States.
6. The raise of the invalidity defence in patent infringement proceedings effects that infringement proceedings are to be stayed, according to provisions of national procedural law, until the courts of the protection State have decided on the validity of the concerned patent according to Article 24(4) of the Brussels Ibis Regulation.
7. Provisional measures are particularly important with regard to (cross-border) intellectual property litigation.
8. When the defence of invalidity of the concerned patent is raised in provisional proceedings, Article 24(4) of the Brussels Ibis Regulation is not applicable, regardless of whether the court before which provisional proceedings are brought has jurisdiction according to Article 35 of the Brussels Ibis Regulation (independent jurisdiction for provisional measures) or jurisdiction pursuant to Articles 4 or 7 to 26 of the Brussels Ibis Regulation (accessory jurisdiction for provisional measures).
9. General rules of jurisdiction are, and should remain, applicable to patent infringement disputes – also regarding interim relief – meaning that the courts of the protection State should not be assigned exclusive jurisdiction in patent infringement proceedings.
10. A recast of Article 7(2) of the Brussels Ibis Regulation should, in particular, contain the following clarification: “*As to the infringement of a patent, the harmful event solely occurs or may occur in the State where the patent is protected.*”
11. A recast of Article 24(4) of the Brussels Ibis Regulation should provide that the extraterritorial infringement court does not have the possibility to stay infringement proceedings, as an alternative to rendering an incidental decision, *for the sole reason that a defence of invalidity of the concerned patent has been raised*, whereas a stay of infringement proceedings should be possible according to and in the framework of the general rules of jurisdiction provided for in the Brussels Ibis Regulation.
12. It is doubtful whether the European patent with unitary effect will generally be an attractive alternative to a classical European patent.